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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Federal Circuit

BRIEF OF AMICUS CURIAE STATE OF OREGON

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
*MICHAEL D. REYNOLDS
Solicitor General
ROBERT M. ATKINSON
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Amicus Curiae

*Counsel of Record

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QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

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INTEREST OF AMICUS CURIAE

In recent years, Oregon, like much of the rest of the nation, has become deeply involved in what is now commonly referred to as the "global economy." In only five years, for example, Oregon's exports of high technology products increased over 190 percent.[1] In the same period, exports of agricultural products increased more than 70 percent.[2] A large variety of other products, ranging from leather goods and textiles to transportation equipment and "second hand goods," all registered significant export increases.[3] Because of its proximity, the Port of Portland on the Columbia River is the logical choice for most Oregon exporters to get their products to foreign markets. Others, however, find it more convenient, more economical or both to use ports in neighboring states. Similarly, exporters from other states are regular customers of the Port of Portland.

This movement of goods contributes to the economic development of the State of Oregon and to the prosperity of its people. None of it, however, happens in isolation. Congress has recognized that most freight is transported over an "intermodal" national system. That is, freight moves to market by use of a combination of transportation methods, perhaps leaving the factory by truck, traveling cross country by rail and being shipped overseas by water. The nation's ports are the termini of that national, intermodal freight transportation system. The overwhelming majority of Oregon's and the nation's foreign trade moves through those ports. Changing and developing markets, movement of manufacturing operations, mergers and other changes in various components of the freight transportation

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[1] TRADE STATS NORTHWEST, OREGON'S EXPORT TRADE WITH THE WORLD 3 (1997) (reporting increase from 1991 through 1996).

[2] *Ibid.*

[3] *Id.* at 5.

system and even natural disasters can slowly or suddenly transform the needs of exporters, making yesterday's transport solution today's bottleneck. To ensure their ability to compete, the nation's exporters, including those in Oregon, depend on the availability of a flexible network of road, rail, air and water transportation and a "menu" of ports that allows them to select the route that gets their products overseas in the most efficient and economical manner and to change their transportation strategy as needs and conditions change. The health of the ports, an essential link in the national freight transportation system, is, therefore, of vital importance to Oregon's continued economic development. Because the Harbor Maintenance Tax contributes significantly to the federal government's ability to maintain those ports, its continuation is a matter of serious concern for the State of Oregon.

STATEMENT OF THE CASE

Oregon adopts the Statement of the Case in the Petition for Certiorari filed by the United States.

SUMMARY OF ARGUMENT

It is beyond dispute that Congress may impose on exports a fee to recover federal funds expended to maintain the nation's ports. The question presented here is whether the method Congress chose to apportion that fee among those who use the ports transforms the fee into a general revenue measure forbidden by the Export Clause. The court of appeals' conclusion that the chosen method makes the fee into a tax is based in part on an atomistic view of the national freight transportation system in which each load of freight exported may be required to pay fees to maintain only the particular port from which it is in fact shipped. Not only is that analysis based upon a misinterpretation of this Court's cases, it is also based upon a misunderstanding of

the nature and operation of the national freight transportation system.

That a fee is collected at one facility and used to maintain another facility of the same type has never been a valid objection to that fee. Especially in the area of transportation, this Court has recognized that the benefit that flows from the fee is not the creation or maintenance of the specific facility at which it is paid, but the availability of the system of which that individual facility is a part. A majority of the nation's foreign trade passes through the nation's ports. As the developing nature of the global economy suggests and as the recent events illustrate, those who use one port today may require the services of a different port tomorrow. It is against the overall availability of the nation's ports that the benefits flowing from the port use charge must be measured.

ARGUMENT

Even in those contexts in which Congress is forbidden to impose taxes, it may require those who benefit from the use of federally supported facilities to pay the costs the federal government incurs in creating or maintaining those facilities. *Massachusetts v. United States*, 435 U.S. 444 (1978). As a result, even though Congress may not impose a tax or duty on exports, U.S. Const. Art. I, § 9, Cl. 5, it may impose fees to recover costs it incurs in creating or maintaining the facilities through which those exports flow. *Pace v. Burgess*, 92 U.S. 372 (1876). Here, the government incurs costs for the maintenance of the nation's harbors. That it may recover those costs, therefore, should not be open to dispute. The question is from whom and by what formula.

The distinction between a permissible fee and an impermissible tax is revealed by a three-part test. A permissible fee (1)

does not discriminate against constitutionally protected interests or activities, (2) is based upon a fair approximation of use and (3) is not excessive in relation to the costs incurred by the government in providing the service in question. *Massachusetts v. United States*, 435 U.S. at 464; *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 716–20 (1972). The Federal Circuit concluded that the port use charge is not based upon a fair approximation of use. *United States Shoe Corp. v. United States*, 114 F.3d 1564, 1574 (Fed. Cir. 1997).

The court gave three reasons for that conclusion. First, the court noted that the tax is imposed on the exporter, whom the court described as an "indirect user," rather than the ship owner, whom the court characterized as "the direct user." 114 F.3d at 1573. Second, because the charge is calculated based on the value of the exported goods, the court determined that the benefit received is not tied closely enough to the amount of the charge paid. *Id.* at 1572–74. Finally, the court noted that exporters are forced to pay for harbor maintenance "across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use." *Id.* at 1574. Although this brief is addressed primarily to the last of these reasons, each is demonstrably flawed.

1. As the dissenting opinion explained, the majority's first reason is faulty as a matter of the practical economics of the marketplace. 114 F.3d at 1581–82 (Mayer, J., dissenting). This Court has implicitly recognized that, notwithstanding the entity to which the law imposes the fee, it is likely that it will actually be paid by the consumer of the transportation services. Thus, the Court did not "think it particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it

chooses." *Evansville-Vanderburgh*, 405 U.S. at 714. In the *Head Money Cases* (*Edye v. Robinson*), 112 U.S. 580 (1884), the fee was collected from the ship operator rather than the passengers, the "direct" beneficiaries of the fee. The Court nevertheless found that Congress was not exercising the taxing power. *Id.* at 595–96.[4] Here, if the fee were imposed directly on the ship owners, they would be free to pass it along to the exporters. It is difficult to see the constitutional significance in the congressional choice to impose it directly on the exporters, a choice consistent with this Court's express pronouncement in *Evansville-Vanderburgh*.

2. This Court has also rejected the second basis of the majority's reasoning, that the fee is faulty because it is not calculated by a method that, in the court of appeals' view, closely enough approximates the benefits realized by those who pay it. In *Massachusetts v. United States*, for example, the Court considered a "registration tax" on all civil aircraft to recoup the cost of federal aviation programs. 435 U.S. at 446. The Court explained that Massachusetts' argument that the tax in that case was "not directly related to the degree of use of the airways," "has been confronted and rejected in analogous contexts." 435 U.S. at 463 citing *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950). In *Massachusetts v. United States* itself, the Court rejected an intergovernmental tax immunity challenge to the application of the registration charge to a state-owned helicopter even though "a probable deficiency in the formula arises because not all aircraft make equal use of the federal navigational

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[4]The Court, somewhat obliquely, acknowledged the ability of the ship owner to pass the fee on to the passengers, noting that although the fee did not protect the ship owner, "[h]e is the man who reaps the profit from the transaction, who has the means to protect himself and knows well how to do it[.]" 112 U.S. at 595.

facilities or the airports that have been planned or constructed with federal assistance." 435 U.S. at 468. In other words, the fee did not fail the fair apportionment test even though the fee was not directly calculated upon the specific benefit realized by the aircraft's owners and might result in some paying more and others less, in relation to benefit received, than some other method of calculating the charge. Basing the fees on the value of the product exported is hardly "wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied." *Evansville-Vanderburgh*, 405 U.S. at 719.

3. It is on the third leg of the court of appeals' reasoning, however, that Oregon wishes to concentrate. The court complained that the fees were used for the maintenance of all harbors, not just the one from which the cargo in question was actually shipped. *United States Shoe Corp.*, 114 F.3d at 1574. The court did not explain precisely why this aspect of the charge was a defect in respect to the test this Court has applied. Nothing in *Massachusetts v. United States* suggests that the Court had concluded that fees collected at a particular airport could be used to maintain only that airport. To the contrary, the Court explained that the availability of the services paid for by the fee benefits all potential users. 435 U.S. at 468 and n. 23. Nor is there any suggestion in the *Head Money Cases* that the charge paid by an individual shipping line could be used only to provide aid to the immigrants transported by that line. Here, as Judge Mayer explained, all exporters have all ports available to them. *United States Shoe Corp.*, 114 F.3d at 1581 (Mayer, J., dissenting).

Even if the court of appeals' focus were not too narrow legally, it is too narrow factually. The requirement, implicit in the court's reasoning, that a fee collected at one port never be used to maintain a different one takes no account of the benefits

provided by an interconnected system of freight transportation to all exporters. As the national economy has become more integrated into and dependent upon the worldwide marketplace, imports and exports alike have increased dramatically. The total value of the nation's waterborne foreign trade increased by over one hundred and sixty-one billion dollars between 1990 and 1995, a jump of over thirty-five percent. MARITIME ADMINISTRATION OFFICE OF PORTS AND DOMESTIC SHIPPING, UNITED STATES DEPARTMENT OF TRANSPORTATION, A REPORT TO CONGRESS ON THE STATUS OF THE PUBLIC PORTS OF THE UNITED STATES 1994 – 1995 Table 8 (1996) (hereinafter PUBLIC PORTS). Exports accounted for almost seventy billion dollars of that increase, representing growth of over forty-four percent. *Ibid.* Considered in sheer volume, rather than value, exports expanded by almost seventy million metric tons, over twenty percent, between 1994 and 1995 alone. *Ibid.* The overwhelming bulk of that foreign trade, ninety-five percent by volume, moves through the nation's port system. *Id.* at 60. And, foreign trade is expected to double in little more than a decade. *Ibid.*

These rapid increases have exposed significant weaknesses in the national freight transportation system. "[A]ccess to many port terminals in terms of navigation channels, and road and rail links has not kept pace" with the growth in the volume of freight or with improvements in port terminal facilities. PUBLIC PORTS 62. The result is "bottlenecks in the landside transportation system serving the ports." TRANSPORTATION RESEARCH BOARD, NATIONAL RESEARCH COUNCIL, LANDSIDE ACCESS TO U.S. PORTS 1 (1993) (hereinafter LANDSIDE ACCESS). "The transfer of cargo between ports and inland transport is one of the weakest, least efficient, and most costly links in the intermodal transportation chain." *Id.* at 143. Modern cargo vessels are

expensive to operate.[5] Delays in loading or unloading are, therefore, costly. LANDSIDE ACCESS at 41–42.

Congress has expressed its concern about weak linkage between ports and land transportation and has called for a national response. Acknowledging the need to improve the nation's ability to compete in "the global economy," Congress has declared the nation's policy to develop a "National Intermodal Transportation System [that] shall provide improved access to ports and airports, the Nation's link to world commerce." Intermodal Surface Transportation Efficiency Act of 1991, § 2, Pub. L. No. 102-240, 105 Stat. 1914 (hereinafter ISTEA). That national intermodal transportation system includes "all forms of transportation in a unified, interconnected manner[.]" *Ibid.*[6]

Infrastructure weakness is not the only source of delay and consequent expense for exporters. Both long and short term considerations may overtax existing facilities. Containerization and economies of scale, among other factors, have tended to concentrate cargo at fewer terminals. LANDSIDE ACCESS 42. In the long term, those terminals may not have the capacity to meet all the demands their success has created, making it necessary for cargo to move to other facilities to find available port

[5]Container ships can cost as much as $50,000 as day to operate. Bill Mongelluzzo, *Big Jams Cause Cargo Diversion at Los Angeles*, JOURNAL OF COMMERCE, Oct. 29, 1997, at 1A.

[6]Responding both to bottlenecks and the fluid needs of modern business in an international economy, ISTEA envisions "an integrated, closely coordinated system, providing 'seamless' multimodal service for both passengers and freight." Dr. Mark A. Turnquist and Dr. George F. List, *Charting a Course for Intermodal Policy and Research*, 47 TRANSPORTATION QUARTERLY 257, 258 (1993). In that "seamless" system, freight would move much like a letter or a telephone call, choosing whichever means of transportation and route are most efficient and economical at the moment the shipment is ready to move rather than moving over a predetermined course. *Id.* at 267–69.

capacity. *Ibid.* A short term example is provided by the extensive delays in loading and unloading ships caused by the recent shortages of labor and railcars at the Ports of Los Angeles and Long Beach, which normally handle about twenty-five percent of the nation's ocean-going container traffic. Bill Mongelluzzo, *Big Jams Cause Cargo Diversion at Los Angeles*, JOURNAL OF COMMERCE, Oct. 29, 1997, at 1A (hereinafter *Big Jams*); Steve Hayes, *Anxious Shippers Divert Containers*, THE OREGONIAN, November 4, 1997, at D1 (hereinafter *Anxious Shippers*). Other factors, such as market shifts or changes in commodity prices, may make it more profitable to obtain supplies or suppliers from new locations. *See* Dr. Mark A. Turnquist and Dr. George F. List, *Charting a Course for Intermodal Policy and Research*, 47 TRANSPORTATION QUARTERLY 257, 266 (1993).

As one method of transportation achieves new efficiencies or other competitive advantages, some ports may suffer. *See* LANDSIDE ACCESS 43 (ports on the Gulf Coast and Great Lakes have suffered as freight has moved to markets in adjacent areas overland, rather than by ship). Others may benefit. The recent congestion at the Ports of Los Angeles and Long Beach, for example, has caused some shippers to reroute ships, sending goods through other ports. Jim Lynch, *Railroad Crisis a Boon for Port*, THE OREGONIAN, November 1, 1997, at B1 (major shipper moving business temporarily to Port of Portland); *Big Jams, supra* (major retailer sending cargo by water to the East Coast rather than through Los Angeles-Long Beach); *Anxious Shippers, supra* (traffic being diverted to other ports on East and West Coasts).

In a rapidly developing and changing worldwide market, exporters must be able to adapt rapidly to altered circumstances. If the exporter cannot get its product into the nearest port because of weakness in rail or road links, or out of that port

because of congestion that delays unloading the vessels that will carry its products overseas, it must be able to look elsewhere to find the capacity to move its products or face the risk of losing customers to those who can deliver more promptly. Just as the availability of many airports benefits all air travelers, the availability of many ports benefits even those exporters who may use only one of them today. Just as those businesses whose goods were primarily coming through the Ports of Los Angeles and Long Beach yesterday have benefitted from the availability of the other ports they are using today, so will other importers and exporters benefit from the availability of those other ports as their needs or external circumstances make it more expedient for their products to move through different channels and other ports.

A tax is, in general terms, an exaction that goes to the general support of the government. *Head Money Cases*, 112 U.S. at 595-96. It is consistent neither with this Court's cases nor with reality to suggest that a charge that is demonstrably used only for the purposes of maintaining harbors, *see United States Shoe Corp.*, 114 F.3d at 1579 (Mayer, J., dissenting), is transformed into a general revenue measure merely because a class of beneficiaries pays for a system of harbors that actually or potentially benefits all members of that class. The Constitution does not require Congress to blind itself to the realities of economic life, and this Court has repeatedly rebuffed requests that it do so. The court of appeals' overly narrow view of who benefits from the maintenance of a vibrant national freight transportation system and how they do so is out of step with the reality of modern intermodal freight transportation as well as inconsistent with this Court's practical fair apportionment jurisprudence.

CONCLUSION

This court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
DAVID SCHUMAN
Deputy Attorney General
MICHAEL D. REYNOLDS
Solicitor General
ROBERT M. ATKINSON
Assistant Attorney General
Counsel for Amicus Curiae

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